Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-446

MARTIN STERN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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MARTIN STERN,

Petitioner,

vs.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Martin Stern, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 26, 1975.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in Appendix "A" hereto (Appendix "A", pp. A1-A11, *infra*).

Jurisdiction.

The judgment of the Court of Appeals was entered on June 26, 1975. A timely Petition for Rehearing and Suggestion for Appropriateness of Hearing En Banc was filed on July 23, 1975 and denied by the Court of Appeals on August 29, 1975 (Appendix "B", p. B12, *infra*).

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved.

Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Code, Title 18.

§4244 which provides:

"Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any denial of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order

the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury."

Questions Presented.

1. Whether petitioner was denied his Sixth Amendment right to the effective assistance of counsel where defense counsel, knowing that petitioner had a twelve-year history of psychosis involving continuous hospitalization or out-patient treatment, and having himself observed and been advised about petitioner's bizarre and unusual behavior, failed to communicate with any of the hospitals or therapists or make any other investigation into the possibility of the existence of an insanity defense.

2. Whether this court should resolve conflicts among the Circuits and enunciate a definitive standard with regard to the evaluation of claims of ineffective assistance of counsel.

3. Whether this court should adopt the "farce and mockery" standard, the "competent counsel" standard or some other standard by which the federal courts and courts of the various states might be guided in determining claims of ineffective assistance of counsel so as to assure defendants in criminal cases that degree of competency on the part of their counsel necessary to square with the Sixth Amendment right to effective assistance of counsel.

4. Whether the government's failure to trigger proceedings under Title 18 U.S.C. §4244 in light of its pretrial knowledge of petitioner's lengthy history of mental illness and hospitalizations denied petitioner due process of law.

5. Whether the failure of the government and petitioner's counsel's failure to apprise the trial court of the existence of information and evidence evidencing petioner's lengthy history of mental illness and treatment, and casting doubt upon his sanity, resulted in the trial court's failure to make an adequate inquiry in connection with petitioner's purported waiver of a trial by jury.

Statement of the Case.

An indictment was filed on December 4, 1973 charging petitioner with violations of 18 U.S.C. §371 (Count 1), 26 U.S.C. §7201 (Count 2), and 26 U.S.C. §7203 (Count 3). (Conspiring to obstruct the Internal Revenue Service, attempting to evade personal income tax, and willfully failing to file a return.)

Petitioner entered pleas of not guilty to all counts of the indictment and was found guilty after a trial to the court of each count of the indictment on June 27, 1974. On July 10, 1974 petitioner moved for a new trial and filed affidavits and exhibits in support thereof.

The numerous affidavits and exhibits filed in support of petitioner's motion for a new trial and the evidence adduced at the hearing on the motion for new trial may be summarized as follows:

Petitioner entered the United States Army in August of 1945 and commencing in December of that same year began to suffer a series of bronchial asthma attacks for which he was hospitalized in Army hospitals. Petitioner was discharged from the Army in April of 1946, and was informed by Army doctors that this ailment was, in all likelihood, psychosomatic or emotional in origin. After his discharge from the Army, petitioner continued to have his condition for bronchial asthma treated by the Veteran's Administration medical staff. Dr. Meir, who was treating petitioner, referred him to the Social Work Service of the Veteran's Administration Mental Hygiene Clinic in July of 1962 for the purpose of determining whether petitioner's bronchial asthma problems were mentally related or induced because Dr. Meir was of the opinion [C.T. 112[1]] that petitioner's asthma had a psychological or emotional basis. Petitioner was interviewed by the Social Work Service of the Veteran's Administration, which concluded that petitioner be seen as soon as possible because he felt his control over himself to be limited and diminishing.[2]

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[1]C.T. when used herein refers to the Clerk's Record (Pleadings) on Appeal.

[2]The report of petitioner's initial interview on July 5, 1962 was Exhibit "A" attached to and included in his affidavit [C.T. 138-139].

From August of 1962, through February 4, 1964, petitioner was treated by psychiatrist William Cagle, M.D., in the Mental Hygiene Clinic of the Veteran's Administration. Petitioner was thereafter seen and treated from July 19, 1966 through February 29, 1968 by psychiatrist Martin Gordon, M.D., Chief of the Mental Hygiene Section of the Veteran's Outpatient Clinic in Los Angeles. The petitioner is informed by his present psychiatrist that Dr. Cagle and Dr. Gordon both described petitioner as "hysterical, paranoid, suicidal, schizo-affective, psychosis-competent" [C.T. 113].

Since 1960 up until the approximate time of trial in this case, petitioner's personal physician was Milton M. Birnbaum, M.D., with whom petitioner has discussed his personal problems from time to time during this period. Dr. Birnbaum, on numerous occasions, recommended that petitioner seek psychiatric counseling because petitioner described "psychotic" incidents to the doctor [C.T. 116].[3]

Commencing in early 1971 petitioner began group therapy and encounter sessions at the Topanga Center for Human Development for four to six hours per week, and was also treated during 1971 by a clinical psychologist named Albert Freeman, Ph.D., under whose direction petitioner attended weekly group therapy sessions averaging three to five hours per week [C.T. 115].[4]

In May of 1972, petitioner began individual psychotherapy sessions with Zena Malek, Ph.D., a clinical psychologist whose treatment he remained under

[3]A copy of Dr. Birnbaum's report to the Court was incorporated into the Stern affidavit as Exhibit "H" thereof and appears at C.T. 148-149.

[4]A letter from Doctor Freeman may be found at C.T. 144.

throughout the trial in the Court below. Dr. Malek's letter, received in evidence, reported that petitioner had come to her for psychotherapy on April 5, 1972, that he exhibited numerous emotional problems; that during severe stress, petitioner's thoughts became confused and fragmented, and he was unable to either concentrate or communicate effectively [C.T. 116].

During the summer of 1972, petitioner consulted with Bruce I. Hochman, attorney at law, about his then pending criminal tax evasion and executed, on August 10, 1972, a power of attorney authorizing him to act for petitioner in internal revenue matters. It was either August 10, 1972, or a few days prior thereto that petitioner told Mr. Hochman that he resided at the Esalen Institute in Big Sur, California [C.T. 119] and that he was undergoing psychotherapy both at Esalen and from a woman psychotherapist in Los Angeles. Petitioner received group and individual therapy while living at the Esalen Institute in Big Sur, California from the fall of 1972 until February, 1974. Petitioner told Mr. Hochman that he could be reached either directly at Esalen or through his phone service in Los Angeles, and Mr. Hochman was furnished with the necessary phone numbers by petitioner. Mr. Hochman noted in his own handwriting that petitioner had therapy in 1962, and was discharged from the Armed Forces in 1946 for medical reasons related to psychosomatic asthma on his copy of a letter to the Internal Revenue Service which was incorporated as Exhibit "K" to the Stern affidavit[5] [C.T. 120].

When Mr. Hochman and the petitioner discussed the fee that would be charged for Mr. Hochman's services, the petitioner was informed that the fee for Mr. Hoch-

[5]A copy of this letter may be found at C.T. 157.

man's representation of petitioner would be $7,500 [C.T. 121] as a retainer and an additional $7,500 if the matter went to trial, which sums were paid by the petitioner. After $15,000 was paid, Mr. Hochman stated that he would require another $15,000 to proceed to trial. Petitioner "went into shock", and told Mr. Hochman he could not comprehend what it was all about and that he had to call his therapist. Mr. Hochman and an associate removed petitioner to the associate's office. Petitioner was comforted for one-half hour, after which time he told Mr. Hochman that he could not relate his freedom to the requested fee and he had to get back to Esalen.[6] The additional $15,000 was thereafter paid by petitioner.

At every meeting petitioner had with Mr. Hochman and his associate, there was always some reference to his abnormal behavior (Hochman commented on numerous occasions with respect to petitioner's "eccentric behavior and lifestyle"), and Mr. Hochman had in his file memorandums by petitioner [C.T. 122] and his associate, which were incorporated in the Stern affidavit as Exhibits "L", "M", and "N"[7] which all referred to petitioner's abnormal behavior.

On or about May 8, 1974, Mr. Hochman informed petitioner that his case could be disposed of[8] if two conditions were met [C.T. 123] as follows:

a. That Mr. Sturman, his prior counsel, would advise government counsel that petitioner was acting on his advice during the relevant periods;

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[6]A Gestalt community recommended by Dr. Malek [C.T. 145].

[7]These exhibits are at C.T. 159-161, 168, and 165-167, respectively.

[8]On a misdemeanor basis by pleading to Count III of the indictment and having the remaining counts dismissed.

b. That petitioner would submit a letter indicating that he had mental problems to representatives of the United States Government.

At this point petitioner asked Mr. Hochman how many letters from psychiatrists or psychotherapists he wanted him to obtain and also inquired as to what details should be reported by these persons in their letters or reports, concerning his mental condition and treatment and told Mr. Hochman that he had many therapists and could obtain many letters from persons who had treated him. Mr. Hochman stated that it was not necessary to obtain numerous letters from all of his doctors or therapists, but that he should obtain only one letter from one of such persons and that would be sufficient to submit to the United States Attorney in charge of the case. Mr. Hochman stated that it did not matter which therapist he obtained the letter from. Petitioner thereupon obtained a letter from Dr. Albert Freeman which stated that petitioner had attended weekly group therapy sessions during 1971 and was extremely confused and anxiety ridden [C.T. 124, 143-144].

Pursuant to petitioner's request, Mr. Hochman furnished petitioner with a letter which read as follows in his own handwriting and on his firm's stationery:

"Mr. Martin Stern
P. O. Box 38702
Los Angeles, Ca. 90038

Dr. Mr. Stern:

You have asked us for a letter affirming our understanding that the government counsel in your criminal tax case were aware that you have had psychotherapy in the past (and during the

pendency of the tax investigation and pre-trial period).

It is out best recollection that mention was made of these factors to them or that they had otherwise heard of it from others.

We must add, however, that as laymen we did not consider you incompetent to assist us with the preparation of your defense.

Very truly yours

Bruce I. Hochman
Norman H. McNeil" [C.T. 125].[9]

This letter, while claiming that trial counsel did not consider petitioner incompetent for the purpose of assisting in the preparation of the defense, did not claim that trial counsel had explored, investigated or attempted to explore or otherwise investigate the existence of any potential psychological defense that might have been raised (*i.e.*, petitioner's insanity at or about the time of the commission of the alleged offense), nor did the letter claim that defense counsel or the government made any effort to contact, or did contact, any physician, psychiatrist, psychologist, therapist or any other person who had examined, treated, counseled, consulted with or otherwise had any knowledge of petitioner's mental condition at or about the time of the commission of the alleged offense.[10]

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[9]Exhibits "O" and "P" in the Stern Affidavit [C.T. 169, 171].

[10]The thrust of petitioner's contention below was that while defense counsel might well have construed him competent to assist in the preparation of the defense, defense counsel made no effort to investigate or to inquire into the possible existence of a defense based upon petitioner's insanity at or about the time of the commission of the alleged offenses.

Submitted in support of petitioner's affidavit and received in evidence were the reports and affidavits of Drs. Malek and Ciaramelli. Dr. Malek, a licensed clinical psychologist, treated petitioner from April 5, 1972, and stated, *inter alia,* that [C.T. 183]:

> "That if called, sworn and asked to testify in connection with Mr. Stern, I would testify that in my opinion he lacked substantial capacity to conform his conduct to the requirements of the law as the result of mental disease or defect during all portions of the years from 1970 and 1971 in connection with the criminal charges for which he was convicted and further would testify that during all of said times his mental state was such that his mind was incapable of forming or possessing any specific intent to commit any crimes of conspiracy to evade the payment of income taxes or to form any intent to willfully fail to file income tax returns."

The affidavit and report of Dr. Ciaramelli, a psychiatrist Board certified by the American Board of Psychiatry and Neurology, and who had contacted practically all of the persons who had anything to do with petitioner's prior psychiatric treatment, and who submitted petitioner to a battery of psychological tests by an associate, concluded that [C.T. 174-176]:

> "7. That if I were to be called, sworn and requested to testify in this or any proceeding, in any court, I would testify that in my opinion, and based upon my best medical and psychiatric judgment. Martin Stern would be diagnosed as suffering from Schizophrenia, schizo-affective type manifested by schizophrenic symptomatology, de-

lusions of persecution, suicidal ideation, distractibility, depressive thoughts and overactivity * * *

I would further testify that in my opinion, Mr. Stern has been severely disturbed and is still incapable, because of his on-going psychiatric condition to control behavior, his judgment and his self-destructive tendencies. Mr. Stern has been unable to control his thought process. * * * He is unable at this time to control his thoughts, his actions and as a result he is unable to make appropriate choices. I would believe that at the time of the alleged wrongdoings he was in a still more disturbed state, and therefore incapable of adhering to the right. * * *

8. If asked to state my opinion, I would testify that in my opinion, Mr. Stern, as the result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law at the time of the alleged criminal conduct for which he was convicted (the entire years of 1970 and 1971). I would further testify that during the years 1970 and 1971, Mr. Stern's mental condition was such so that his mind was incapable of forming, and could not form, any specific intent necessary to commit the crimes of conspiracy to evade income taxes or the wilful failure to file income tax returns."

Petitioner had also, on numerous occasions, advised Mr. Hochman's associate, Norman McNeil, about his psychotherapy and group therapy treatment. Received into evidence were two memoranda from Mr. McNeil to Hochman. In one it was stated that "Martin visited me this afternoon and, as expected, he is totally anxiety ridden." [R.T. 123, 163[11]]. In the other, it was stated that Sturman, appellant's tax attorney, had told McNeil that [R.T. 165-166]—

> "* * * [Sturman had] rejected the availability of a tentative return because there was simply not enough information to put one together and Martin was in such a mental condition that he was not responsive. I gathered that Martin's mental condition was somewhat the same as when we first met him here."

Herbert Sturman, the attorney who had represented petitioner since 1964, and who had occasion to see him on numerous occasions for a ten-year period, executed an affidavit, received into evidence, alleging that on May 10, 1974 he attended a meeting in the law offices of Bruce Hochman, where Mr. Hochman, Mr. McNeil, Mr. Terry Lord (government trial counsel) and Mr. John Kent (of the Regional Counsel's office of the Director of Internal Revenue) were present. At this meeting Mr. Sturman stated in the presence and hearing of all those present that the appellant had serious mental problems and that these problems had existed for some time [C.T. 180].

Mr. Sturman also described other conversations with Mr. McNeil and Mr. Hochman prior to trial wherein he discussed petitioner's mental condition in terms of petitioner being nonresponsive and confused to the point of incoherency. After these discussions neither Mr. Hochman nor Mr. McNeil contacted Mr. Sturman with regard to Mr. Stern's mental condition [C.T. 181].

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[11]"R.T." when used hereafter refers to the Reporter's Transcript of Proceedings.

Subsequently, a hearing was held on the motion for a new trial on August 19, 1974. At this hearing, petitioner's counsel explained that the essence of their argument was that petitioner's trial counsel had erred by not making any inquiry into petitioner's psychiatric background. The trial court thereafter appointed Dr. Seymour Pollack to report on (1) the petitioner's present mental state; (2) the ability of the petitioner to understand the proceedings against him from January 1, 1974, to date; (3) the petitioner's ability to properly assist in his own defense; and (4) the petitioner's sanity at the time of the offense.

Dr. Pollack's report concluded that (1) petitioner was presently capable of understanding the proceedings against him and of rationally cooperating and assisting in his own defense; (2) petitioner was able to understand the proceedings against him from January 1, 1974, to the time of the report, and able to cooperate rationally with counsel in his own defense during that time; and (3) petitioner, even though suffering from Schizophrenia, did not lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the commission of the charged offenses.[12]

[12]Petitioner's counsel had urged on the hearing of the motion for a new trial and on appeal below that any such retrospective determination with respect to petitioner's competency to stand trial and sanity at or about the time of the commission of the offenses was impermissible and came too late. Petitioner claimed that the investigation into his psychiatric background and examinations with respect to the issues of sanity should properly have taken place *prior* to his trial and *prior* to the finding of guilty. It was suggested that such investigation into defendant's sanity by defense counsel might have affected counsel's determination that it would be in the best interests of petitioner to waive a trial by jury, and it was further urged that the question of petitioner's sanity at or about the time of commission of the offenses should properly have been presented to the trier of fact as a part of the case in chief, and that petitioner was entitled to have the trier of fact hear and determine the question of sanity rather than have the issue determined after the trial itself had been completed and the petitioner adjudged guilty. (See, *e.g. Drope v. Missouri*, ... U.S. ....., 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).)

Petitioner's counsel on the motion for a new trial, thus claimed that the issue before the court was not whether petitioner was sane or insane at the time of the offenses, or competent or incompetent to assist in the preparation, but rather whether trial counsel had rendered effective assistance in failing to investigate the existence of a possible psychiatric defense [R.T. 617-626].

Petitioner's trial counsel testified that he was retained to represent petitioner in 1972. He contacted Internal Revenue Service and negotiated with them and John Kent of the Regional Counsel's Office. Mr. Hochman presented to Mr. Kent certain defenses on behalf of Mr. Stern, which defenses were discussed with Mr. Stern at that time. Mr. Hochman then described certain technical issues which were discussed with Mr. Kent.

Mr. Hochman testified that petitioner had told him that he had therapy and was involved in a group therapy project in Northern California [R.T. 608]. Petitioner and Mr. Hochman also discussed whether or not this background should be presented to the government and the following discussion was related:

> "Q And why would that have been presented to the attention of the Government or the Court?
>
> "A I felt this was somewhat a bizarre case, and perhaps the fact that he had some therapy might be helpful in terms of dialogue with Government counsel.

"Q Was it considered by you as a possible defense to the specific intent required by the statutes under which Mr. Stern was being investigated?

"A A possibility, sir.

"Q And did you continue to discuss this with Mr. Stern?

"A It was discussed again with Mr. Stern after the indictment and before trial.

"Q And with whom did you discuss it at that time?

"A Mr. McNeil, who was an attorney who works with me, Mr. Stern and myself.

"Q And what information did you have at that time that you didn't have prior to that meeting, if any?

"A None.

"Q Now, did you discuss any more with Mr. Stern the possibility of utilizing an insanity defense for Mr. Stern?

"A It was only discussed on one occasion after the indictment and before trial. *But again, the word 'insanity,' as such, was not used.*

"The word that was used, perhaps euphemistically, was 'diminished capacity,' or perhaps the concept of diluting specific intent for a specific intent crime.

"Q And you subsequently did try the case before this Court, and you did not utilize that as a defense, is that correct?

"A That is correct.

"Q Why not?

"A I believe it would have been counterproductive." [R.T. 609-610].

On cross-examination, Mr. Hochman agreed that the recitation of facts relating to him in the Stern and Sturman affidavits in support of the motion for new trial were correct. [R.T. 612.] Finally, Mr. Hochman agreed that he had made no attempt to contact any of the persons described in petitioner's affidavit or in the supporting exhibits in regard to petitioner's mental condition [R.T. 615].

Mr. John Kent, one of the prosecutors at the trial, testified that he was employed in the Criminal Tax Division, Office of Regional Counsel, Internal Revenue Service, and that petitioner's case had been assigned to him [R.T. 633]. He testified that prior to trial he knew that petitioner had a psychiatric history as a result of being shown Dr. Freeman's letter [C.T. 143-144] by Mr. Hochman [R.T. 634-637, 639-640] and that Mr. Sturman "may very well have said" that petitioner had some serious mental problems [R.T. 638-639]. On cross-examination, Mr. Kent stated that all of the information the Government had concerning any incapacitation on the part of petitioner was received from petitioner's attorneys [R.T. 642]. Mr. Terry Lord, one of the government prosecutors, then stipulated that he had learned from Mr. Hochman that petitioner was at Esalen Institute and that he was going there for some mental disorder, and that Mr. Sturman had stated to him that petitioner had some mental disorders [R.T. 643-645].

The District Court denied the motion for a new trial [R.T. 652]. In so doing, the Court explained [R.T. 651-652]:

> "The Court would have to be shown that the representation afforded this defendant reduced

> the trial to a sham and a farce before I think the law calls upon the Court to set aside the verdict. And that certainly cannot be said in this case."

The trial court then sentenced petitioner to imprisonment for a period of four years and a fine [R.T. 656].

The United States Court of Appeals for the Ninth Circuit affirmed, opining (Appendix, p. 6):

> "This court will not reverse a judgment of conviction unless a defendant's representation has been so inadequate as to make his trial a farce, sham, or mockery of justice. See, e.g., *United States v. Martin*, 489 F.2d 674 (9th Cir. 1973); *United States v. Ortiz*, 488 F.2d 175 (9th Cir. 1973)."

Further facts are stated in the Opinion of the Court of Appeals contained in the Appendix.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With Decisions of Other Courts of Appeal With Respect to the Standard Applied in Evaluating Claims of Ineffective Assistance of Counsel.

Ever since this court's decision in *Gideon v. Wainwright* (372 U.S. 335 (1963)), construction of the constitutional guarantee of counsel[13] has undergone a steady, progressive expansion. *Gideon* stimulated an increased recognition of the right to the effective assistance of counsel[14] and this court has indicated in a consistent series of cases[15] that the right to counsel means the right to effective assistance.

Although it is said that this court has not promulgated any standard for evaluating claims of ineffective assistance of counsel and has not yet fully defined the meaning of "effective assistance" of counsel,[16] a num-

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[13]U.S. Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."

[14]See generally Waltz, Inadequacy of Trial Defense Representation as a Ground for Postconviction Relief in Criminal Cases, 59 Nw. U.L.Rev. 289 (1964) [hereinafter cited as Waltz].

[15]*Michel v. Louisiana*, 350 U.S. 91 (1955); *Von Moltke v. Gillies*, 332 U.S. 708 (1948); *Hawk v. Olsen*, 326 U.S. 271 (1945); *White v. Ragen*, 324 U.S. 760 (1945); *Glasser v. United States*, 315 U.S. 60 (1942); *Avery v. Alabama*, 308 U.S. 444 (1940); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932); *cf. Betts v. Brady*, 316 U.S. 455 (1942).

[16]See *State v. Sneed*, 284 N.C. 606 (201 S.E.2d 867 (1974)); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process, 54 Minn.L.Rev.* 1175, 1241 (1970). *Powell v. Alabama;* 287 U.S. 45 (1932);*Johnson v. Zerbst*, 304 U.S. 458 (1938); *Avery v. Alabama*, 308 U.S. 444 (1940). See also The Right to Competent Defense Counsel Emergence of a Sixth Amendment Standard of Review on Appeal and the Persistence of the "Sham and Farce" Rule in California, 15 Santa Clara Lawyer 355, 356 (1975).

ber of this court's decisions have indirectly guided the development of the right to effective assistance of counsel.

Two recent cases decided by this court have admonished trial judges to see that defense counseling be "within the range of competence demanded of attorneys in criminal cases."[17]

The fact that this court has not as yet enunciated a definitive standard of effective representation has left the Circuit Courts seemingly divided. The Third, Fifth, and Sixth Circuits have adopted the standard of normal or reasonable competency suggested in *McMann*. (See *Moore v. United States*, 432 F.2d 730 (3rd Cir. 1970) (en banc); *West v. Louisiana*, 478 F.2d 1026 (5th Cir. 1973); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974).)[18] The Fourth and District of Columbia Circuits also have adopted that standard, but have added specific guidelines defining the duties owed by appointed counsel to his client.[19]

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[17]*Tollett v. Henderson*, 411 U.S. 258, 266 (1972), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

[18]In *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), the Fifth Circuit interpreted the reasonable counsel standard to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.", at 599. One of the most frequently cited cases on this issue, the Ninth Circuit's *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962) at page 37, quotes and appears to adopt this language from *MacKenna v. Ellis*, *supra*, in defining the Ninth Circuit's standard, but the Ninth Circuit appears to have again retreated to the "farce and mockery" standard in the within action for in affirming petitioner's conviction, the Court said:

> "This court will not reverse a judgment of conviction unless a defendant's representation has been so inadequate as to make his trial a farce, sham, or mockery of justice. See, e.g. *United States v. Martin*, 489 F.2d 674 (9th Cir. 1973); *United States v. Ortiz*, 488 F.2d 175 (9th Cir. 1973)." (App. p. A6).

[19]*Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968), cert. denied 393 U.S. 849 (1968). In *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973) the court divided the duties owed by counsel to clients into three categories. That a defense counsel is obligated to inquire into and investigate possible psychiatric defenses, to contact and interview persons possessed of knowledge dealing with a defendant's history of mental illness and psychiatric treatment, to make motions for psychiatric examinations is implicit therefrom.

The Ninth Circuit, along with the First, Second, Seventh, Eighth, and Tenth Circuits, is said to apply the so-called "mockery of justice" standard. (See *Allen v. VanCantfort*, 436 F.2d 625 (1st Cir. 1971); *Moran v. Hogan*, 494 F.2d 1220 (1st Cir. 1974); *Bottiglio v. United States*, 431 F.2d 930 (1st Cir. 1970); *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36 (2nd Cir. 1972); *Cardarella v. United States*, 375 F.2d 222 (8th Cir. 1967).[20]

However, the Ninth Circuit's leading and frequently cited case of *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962) makes no reference whatever to the "mockery" test and citing *Powell v. Alabama*, 287 U.S. 45, 71, the Court held that, "Appellant was entitled to 'effective aid in the preparation and trial of the case.'" (310 F.2d 30 at 37).

This apparent conflict dividing the Circuits appears to have engendered a significant number of Law Review comments and articles.[21]

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[20]Recent cases from the First Circuit appear to evidence a retreat from the "farce and mockery" standard for effective assistance of counsel toward the more liberal "reasonably competent assistance of counsel acting as his diligent, conscientious advocate" standard enunciated in *United States v. DeCoster*, 487 F.2d 1197, 1202 *supra*. (See *Dunker v. Vinzant*, 505 F.2d 503 (1st Cir. 1974), and *Karger v. United States*, 388 F.Supp. 595 (U.S.D.C. Mass. 1975) applying higher standard.)

[21]Comment, *Federal Habeas Corpus—A Hindsight View of Trial Attorney Effectiveness*, 27 La.L.Rev. 784 (1967); Comment, *Standards to Guarantee Effective Assistance of Counsel*, 8 Santa Clara Lawyer 108 (1967); Comment, *Incompetency*

(This footnote is continued on next page)

The progressive innovation of standards of review under the Sixth Amendment has sometimes developed over time as a countervailing current in the law. In 1960, the Fifth Circuit Court of Appeals held in *MacKenna v. Ellis,* 280 F.2d 592, modified, 289 F.2d 928 (5th Cir. 1960) that a defendant is entitled to

and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus, 20 Sw. L.J. 136 (1966); Comment, *Effective Assistance of Counsel for the Indigent Defendant,* 78 Harv.L. Rev. 1434 (1965); Comment, *Effective Representation—An Evasive Substantive Notion Masquerading as Procedure,* 39 Wash.L.Rev. 303 (1958); Comment, *Incompetency of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts,* 4 U.C.L.A. L.Rev. 400 (1957); Comment, *Quality of Counsel in Criminal Cases,* 8 Ark. L.Rev. 484 (1954); Note, *The Right to Counsel and the Neophyte Attorney,* 24 Rutgers L.Rev. 378 (1970); Note, *Ineffective Assistance of Counsel,* 14 S.D. L.Rev. 287 (1969); Note, *The Effective Assistance of Counsel: An Incomplete Constitutional Right,* 18 Me. L.Rev. 248 (1966); Note, *Right to Counsel: Effective or Competent Representation,* 20 N.Y.U. Intra.L.Rev. 259 (1965); Note, *The Right to Effective Counsel in Criminal Cases,* 18 Vand.L.Rev. 1920 (1965); Note, *The Right to Counsel in Federal Courts and the Proposed Amendments to the Federal Rules of Criminal Procedure,* 39 Ind.L.J. 134, 154-56 (1963) (discussing effectiveness and time allowed for preparation); Note, *Effective Assistance of Counsel,* 49 Va. L.Rev. 1531 (1963); Note, *Incompetent Counsel as Ground for New Trial in Criminal Cases,* 47 Colum. L.Rev. 115 (1947).

The leading treatment is Waltz, *supra* note 14. Other treatments include Bailey, *Defense Counsel Incompetence in Criminal Trials, Past-Present-Future,* 10 S.Tex. L.J. 121 (1968); Bazelon, *The Defective Assistance of Counsel,* 42 U.Cin.L.Rev. 1 (1973); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 Va.L.Rev. 927 (1973); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations,* 22 Sw. L.J. 260 (1968); Finer, *Ineffective Assistance of Counsel,* 58 Cornell L.Rev. 1077 (1973); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process,* 54 Minn. L.Rev. 1175, 1239-63 (1970). See also Waltz, *Ineffective Trial Representation as Grounds for Court-Martial Reversal in Military Justice,* 3 Military L.Rev. 107 (1959); Wilson, *The Right of the Accused to Effective Counsel: The Military View, 14 Kan.L.Rev.* 593 (1966); Comment, *The Right to Competent and Effective Counsel Under the Uniform Code of Military Justice,* 46 Tul. L.Rev. 293 (1971). See also Strazzella, *Ineffective Identification Counsel: Cognizability Under the Exclusionary Rule,* 48 Temple L.Rev. 241 (1975).

counsel "reasonably likely to render, and rendering reasonably effective assistance." Soon after, this standard was apparently adopted by the Ninth Circuit in *Brubaker v. Dickson,* 310 F.2d 30, 37 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963), but *Brubaker* was not followed for this principle in the Ninth Circuit. (See *United States v. Ortiz,* 488 F.2d 175 (9th Cir. 1973); *United States v. Williams,* 455 F.2d 361 (9th Cir. 1972); *Grove v. Wilson,* 368 F.2d 414 (9th Cir. 1966). *But see Leano v. United States,* 457 F.2d 1208, 1209 (9th Cir.), cert. denied, 409 U.S. 889 (1972) (applying both standards), where the farce and mockery rule continues to be applied as the rule of decision in Sixth Amendment cases.) In the Fifth Circuit *MacKenna* received a mixed reaction. Under the stimulus of influential cases such as *Williams v. Beto,* 354 F.2d 698 (5th Cir. 1965), which subsequently reapplied the farce and mockery rule, the reasonableness standard was sometimes announced in the same decision as the farce and mockery rule. See, *e.g., Brooks v. Texas,* 381 F.2d 619 (5th Cir. 1967). The resulting confusion was felt in the Texas courts whose opinions reflected the vacillation of the federal court. See *Ex parte Gallegos,* 511 S.W.2d 510 (Tex. Cr. App. 1974) (reviewing cases). A similar effect is evident in California. *E.g., People v. Strawder,* 34 Cal.App.3d 370, 381, 108 Cal.Rptr. 901, 908 (1973) (applying both standards). In *Herring v. Estelle,* 491 F.2d 125 (5th Cir. 1974), however, the court of appeals undertook a review of its decisions and emphatically reaffirmed the *MacKenna* standard. As the rule has been clarified, a defendant is entitled to "reasonably effective assistance of counsel." *Id.* at 128 The farce and mockery rule is no longer controlling as a rule of decision in the Fifth Circuit.

It is respectfully submitted that this Court should resolve the conflicts among the circuits and the divergence existing among state courts of last resort with respect to the standards to be applied in determining claims of ineffective assistance of counsel.

2. The Decision Below Is in Direct Conflict With Other Decisions of the Ninth Circuit and With Recent Pronouncements of This Court.

In affirming petitioner's conviction, the Court of Appeals applied the "farce and mockery" standard (See p. 20, *supra* and Appendix, p. A6).

In so doing, the Court of Appeals retreated from its own holding in the leading case of *Brubaker v. Dixon,* 310 F.2d 30 (9th Cir. 1962), which makes no reference to the "mockery" test, and where the court stated:

> "This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. *Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'* Determining whether the demands of due process were met in such a case as this requires a decision as to whether *'Upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness;* it is inevitably a question of judgment and degree." (Emphasis added.)[22]

[22]The California Supreme Court, in *In re Saunders,* 2 Cal.3d 1033 (1970) quoted liberally from *Brubaker v. Dixon, supra,* in granting a writ of habeas corpus and reversing a judgment of conviction on the ground that the petitioner was denied the right to the effective assistance of counsel where defense counsel, having been made aware of petitioner's history of a head injury made no effort to ascertain specifics of the history or to present a defense based upon it. The California high court held that trial counsel failed to prepare, and that appellant's defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all.

It is respectfully submitted that the decision of the Court of Appeals below conflicts with the decisions of this court in *McMann v. Richardson,* 397 U.S. 759, 771 (1970) and *Tollett v. Henderson,* 411 U.S. 258 (1972) which held that defendants who enter pleas of guilty are entitled to advice which falls "within the range of competence demanded of attorneys in criminal cases."

Two of the federal circuits (*Beasley v. United States,* 491 F.2d 687, 693 (6th Cir. 1974); *United States v. DeCoster,* 487 F.2d 1197, 1202 (D.C.Cir. 1973)) appear to have reached the conclusion that the pronouncements of this court in *McMann* and *Tollett* represent this court's construction of the Sixth Amendment guarantee of effective assistance of counsel to mean "effective assistance of competent counsel."

It is respectfully submitted that the early standard under which claims of ineffective assistance were evaluated on appeal in a majority of jurisdictions was exceptionally harsh, the product of an anachronistic rule intended to discourage allegations of inadequate representation. In keeping with the progressive development of the law respecting the guarantee of counsel, this older standard is rapidly being abandoned, and newer standards applicable under the Sixth Amendment have now emerged.

This court should resolve the conflicts among the lower courts and enunciate a clear, definitive standard with regard to the evaluation of claims of ineffective assistance of counsel.

That there is confusion within the Ninth Circuit itself with respect to the standard to be applied in evaluating claims of ineffective assistance of counsel is evidenced by *Andrews v. United States,* 403 F.2d 341 (9th Cir. 1968) which bears a strikingly similar resemblance to the within proceeding and in which the Court of Appeals reached an opposite conclusion. In *Andrews,* the appellant received a head injury for which he was hospitalized while in the Army in 1944. In 1953 he was admitted to a Veterans Administration hospital with the diagnosis of "schizophrenic reaction, schizoid affected type. . . ." These matters came to light in the report of a psychiatrist appointed by the Court on its own motion following appellant's conviction. The Court, pointing out that it appeared from the face of the trial record that trial counsel's efforts fell below minimum standards, observed:

> "Appellant's counsel does not fare so well. He made no pretrial inquiry into appellant's disability, though reason for inquiry had been fairly presented to him. When appellant's condition was disclosed on the record at trial, counsel made no request for a continuance to enable him to investigate but simply rested appellant's defense. Cf. *Brooks v. State of Texas,* 381 F.2d 619, 622-623 (5th Cir. 1967); *Hintz v. Beto,* 379 F.2d 937, 941-942 (5th Cir. 1967). He did not move, then

> or thereafter, for an inquiry into appellant's competency to stand trial, or his mental capacity to commit the offense, although the necessity for such inquiry was obvious. Counsel offered no evidence to assist the court in its determination of these critical issues, either by examination of Dr. Crahan or by offering proof of independent facts and opinion . . ." (403 F.2d 341, 343-344).

It is respectfully submitted that this Court should set out definitive standards for the evaluation of claims of incompetency of counsel so as to produce uniformity of decisions among the circuits and among the various state courts.

3. The Rule Announced Below Reaffirming the "Farce and Mockery" Standard Is Undesirable.

Chief Justice Burger, in a persuasive article (*Burger,* The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973)), has suggested that the complexity and specialized nature of criminal advocacy may require certification of criminal practitioners to insure adequate representation. In this context, Chief Judge Bazelon of the District of Columbia Circuit has strongly suggested that the farce and mockery rule, by imposing upon criminal defendants an extraordinary burden of proof of their counsel's ineffectiveness, has served to perpetuate substandard representation of criminal defendants (See *Bazelon,* The Defective Assistance of Counsel, 42 U. Cinn. L. Rev. 1, 2 (1973)).

These considerations underscore this Court's determination that the Sixth Amendment requires competent assistance. The Court has said, in language found persuasive by the Oregon Court of Appeal (see *Rook v. Cupp*, 526 P.2d 605, 606 (Ore. Ct. App. 1974)), that

> defendants facing felony charges are entitled to the effective assistant of competent counsel . . . (I)f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. (*McMann v. Richardson*, 397 U.S. 759, 771 (1972) (footnote omitted).

Embodied in this admonition is the principle that individual courts bear the responsibility for the integrity of the criminal proceedings before them. The "farce and mockery" rule is in large measure a rule of judicial convenience. Where it has been perceived as having failed to serve the interests of justice, the rule has given way to a more exacting standard.

It is respectfully submitted that in assessing the performance of counsel, "the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place" as expressed in *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970), should be adopted. This standard indicates that a determination of whether a defendant has been afforded effective assistance turns upon the quality of counsel's performance as measured against the normative level of performance expected of a criminal practitioner. The

question is whether counsel has performed "at least as well as a lawyer with ordinary training and skill in the criminal law." (*Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)). This rule is similar to that standard applied in evaluating the performance of professional groups under the law of negligence. (See generally Restatement (Second) of Torts §299A (1965)). It has been consciously borrowed from that body of law (*Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970)). One compelling reason for adopting such a standard is that a criminal defendant, at the risk of his life or liberty, should be entitled to services of a quality at least commensurate with that required of civil practitioners of law. Another is that the legal profession cannot require less of itself, where a constitutional guarantee is at issue, than it requires of other professions in their daily practice. (*State v. Harper*, 57 Wis.2d 543, 557, 205 N.W.2d 1, 9 (1973)).

The reasonable man approach allows a greater precision in evaluating claims of ineffective assistance of counsel. The phrase "farce and mockery" has no intrinsic meaning. The reasonable man approach, however, is familiar to the courts and bar and has long been known to provide consistency of the law. It provides a means of undertaking a more intensive analysis of the conduct of counsel than the all or nothing approach of the mock trial rule.

It is submitted that the chief virtue of the reasonable man approach is that it provides the courts with a measurable guide for determining difficult questions regarding the quality of counsel's decision making.

The American Bar Association Project on Standards for Criminal Justice has recently published a volume of

ethical standards for attorneys in criminal practice. See ABA, Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971). This work is an exhaustive treatment of the function and ethical duties of defense counsel at the pre-trial, trial and post-conviction stages of criminal process. Several courts have referred to this work as providing an appropriate guide for defense attorneys in providing services to criminal defendants. (See *United States v. DeCoster,* 487 F.2d 1197, 1203 (D.C. Cir. 1973); *State v. Harper,* 57 Wis.2d 543, 553-57, 205 N.W.2d 1, 6-9 (1973)).

Petitioner respectfully urges this court to adopt the more enlightened and modern view and grant the petition herein.

4. In Light of the Government's Knowledge of Petitioner's Psychiatric History and Bizarre Conduct, Government Counsel Was Required to Advise the Court of the Information Possessed by Him and to Trigger Proceedings Under 18 U.S.C. Section 4244.

Under 18 U.S.C. Section 4244 the United States Attorney is duty bound to request a determination of competency of an accused "whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation * * * (he) has reasonable cause to believe that a person charged with an offense * * * may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense."

It is apparent from the evidence adduced at the hearing on the motion for new trial that the Government was

well aware of petitioner's mental problems and should have triggered proceedings under 18 U.S.C. Section 4244.

It is respectfully submitted that *Morris v. United States* (9th Cir. 1969) 414 F.2d 258, should have disposed of this issue.

In *Morris,* no hearing on competency pursuant to 18 U.S.C. Section 4244 was requested by the United States Attorney or defense counsel, and the Court did not order such a hearing on its own motion. The Court of Appeals observed that although the proceedings prior to sentencing did not provide the reasonable cause to trigger proceedings under 18 U.S.C. Section 4244, matters contained in the pre-sentence report showing a prior history of mental illness and treatment provided the "reasonable cause to believe" so as to have required the Court to cause the accused to be examined "as to his sanity and/or competency to stand trial".[23]

In reversing a judgment on conviction in *Morris v. United States, supra,* the Court of Appeals pointed out

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[23]Although the Court in the within action did order an 18 U.S.C. Section 4244 examination prior to sentence, it is evident that the government was in possession of the "reasonable cause to believe that a person charged with an offense (the defendant herein) against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him . . .", long prior to the commencement of the *trial* and that by virtue thereof the government was compelled to trigger the proceedings under 18 U.S.C. Section 4244 prior to commencement of the trial. Thus, unlike the situation in *Morris,* where none of the participants nor counsel had evidence of mental illness until the time of sentence, the government here knew all along that Stern had a history of mental illness and treatment. Its suppression of this knowledge and its failure to comply with the mandate of 18 U.S.C. Section 4244 in a timely fashion cannot be excused on the ground that it conceded that a mental examination should be obtained after the trial had concluded and after new counsel had strenuously raised the insanity issue.

that the trial court was precluded from reinstating the judgment of conviction if the appellant were found, at a requisite hearing, to have been competent at the date of his arraignment, trial and sentence, observing that the issue had been determined in *Meador v. United States* (9th Cir. 1934) 332 F.2d 935.

The reason that there was nothing before the Court which would have indicated to the Court the necessity for a more searching inquiry on the question of petitioner's jury waiver is that neither petitioner's counsel nor Government counsel discharged their respective duties to advise the Court of petitioner's psychiatric history.

Any purported finding on the part of the trial court made after trial had been completed that petitioner was competent to stand trial, even if correct, is not determinative of the issue of the validity of petitioner's jury waiver.

While petitioner's level of awareness and comprehension might have been high enough to render him competent to stand trial, it may not have been high enough to allow him to validly waive his constitutional right to a trial by jury or it may have called for a more patient and detailed explanation to him of the nature of that right (See *United States v. David,* 511 F.2d 355 (D.C. Cir. 1975). See also *Naples v. United States,* 307 F.2d 618 (D.C. Cir. 1962) suggesting that the court make appropriate findings with respect to its approval of a jury waiver in circumstances indicating the possible presence of a substantial mental disorder).

Quite recently, in *Drope v. Missouri,* .... U.S. ...., 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), this Court charged the trial courts with the duty to "always be

alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." The trial court's duty in this regard can hardly be discharged properly where, as here, both government and defense counsel fail to advise the court of knowledge and evidence in their possession which casts grave doubt upon a defendant's sanity or competency.

5. The Abject Failure on the Part of Both the Government and Defendant's Trial Counsel to Apprise the Court of the Existence of the Wealth of Information Evidencing Defendant's Lengthy History of Mental Illness and Treatment and Casting Doubt Upon His Sanity, Both at the Time of the Commission of the Alleged Offenses and at or About the Time of Trial, Resulted in the Trial Court's Failure to Make an Adequate Inquiry of the Defendant in Connection With His Purported Waiver of a Trial by Jury.

On June 24, 1974, the following proceedings occurred:

"THE COURT: United States versus Stern.

"MR. LORD: Good morning, your Honor, Terry Lord for the Government, and the Government is ready.

"MR. HOCHMAN: Bruce I. Hochman, Norman McNeil for the defendant who is present.

"THE COURT: Is this going to be a court trial?

"MR. HOCHMAN: If it please the Court, there is a waiver requiring, I think, only your signature.

"THE COURT: Mr. Stern, do you understand that you are entitled to a trial before a Court of a jury?

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you personally waive a right of trial by jury?

"THE DEFENDANT: Yes.

"THE COURT: And do you join, Mr. Hochman?

"MR. HOCHMAN: Yes, sir.

"THE COURT: And do you join, Mr. Lord?

"MR. LORD: Yes, I do, your Honor." [R.T. 14].

It is apparent that the Court's inquiry of the defendant was most cursory and superficial.

The rule with respect to the inquiry that must be made of a defendant who desires to waive a trial by jury and the duties which must be discharged by the Court in permitting such waiver, were originally set forth by this Court in *Patton v. United States* (1930) 261 U.S. 276, 312, thusly:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode

> of trial or from any of the essential elements thereof, and with a caution increasing in degree of the offense dealt with increase in gravity."

The foregoing statement was quoted with approval by this Court in *Singer v. United States* (1965) 380 U.S. 24, 34, in an Opinion by Chief Justice Warren and the Ninth Circuit, in *United States v. Guerrero-Peralta* (1971) 446 F.2d 876, 877, Fn.2, has stated:

> "*Patton* states emphatically that waiver of the right to a jury of twelve requires 'the express and intelligent consent of the defendant' (261 U.S. at 312, 50 S.Ct. at 263). The note of the Advisory Committee on Rules states that Rule 23(b) 'is a restatement of existing practice, the constitutionality of which was approved in *Patton v. United States.*' "

Doubtlessly, had the Court below been apprised of Mr. Stern's longstanding history of mental illness and treatment, it would have made a deeper and more searching inquiry with respect to his understanding of his right to trial by jury; inquired more thoroughly into the question of whether his consent was intelligent and further, might have determined that a psychiatric examination of petitioner should have been held for the purpose of inquiring into his competency to waive his right to stand trial by jury.[24]

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[24]In this connection, see Tigar, Waiver of Constitutional Rights; Disquiet in the Citadel, 84 Harvard Law Review (1970). As the Court of Appeals pointed out in *Sieling v. Eyman,* 478 F.2d 211, 215 (9th Cir. 1973), the degree of competency required to waive a constitutional right is that degree which enables a defendant to make decisions of very serious import and the Court is required "to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced."

Since a defendant is not competent to plead guilty "if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea," . . . it follows that a defendant is not competent to waive his right to trial by jury if mental illness has substantially impaired his ability to make a "reasoned choice".[25]

In light of petitioner's past history, an inquiry should have been made into these matters.

Government and trial counsel's failure to apprise the Court of the pertinent facts resulted in the trial court's failure to make a proper inquiry for the purpose of assessing Stern's competency to waive jury. A timely disclosure of the information with respect to petitioner's mental condition would have obviated this and the other errors complained of herein.

It must also be recalled that in petitioner's motion for new trial, his uncontroverted affidavit alleged that:

> ". . . I informed my counsel that in the event that this was not successful that I wanted my case tried only before a jury. In this regard, my counsel was adamant in that he was going to proceed before a judge since, in his opinion, the ultimate outcome would make no difference on appeal. He further advised that he wanted a fast trial in order not to take up the Court's time for, in the event of conviction, the Court would take this into consideration on sentencing." [C.T. 102-103].

[25]In *Rees v. Peyton*, 384 U.S. 312, 86 S.Ct. 1505, 16 L. Ed.2d 583 (1966) this Court held that a petitioner could not be permitted to withdraw his pending certiorari petition where his counsel had put before the court a question of the petitioner's competence until it could be determined "whether he has a capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation, or, on the other hand, whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in these premises." 384 U.S. at 314.

Here again, the default of government and defense counsel resulted in the trial court's being kept uninformed of circumstances which would have alerted the Court to make a more meaningful inquiry into the validity of the jury waiver in light of the obligations imposed upon the trial court by *Drope v. Missouri, supra.*

Conclusion.

The petition for a writ of certiorari should be granted.

Dated: Los Angeles, California, October 3, 1975.

Respectfully submitted,

HERBERT D. STURMAN,
Counsel for Petitioner.

THEODORE A. COHEN,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America v. Martin Stern, Defendant. June 26, 1975 (No. 74-1376).

Appeal from the United States District Court for the Central District of California.

Before: ELY and WRIGHT, Circuit Judges, and McNichols, District Judge.*

WRIGHT, Circuit Judge:

Stern was convicted after a trial to the court of conspiring to obstruct the Internal Revenue Service, attempting to evade personal income tax, and willfuly failing to file a return. His motion for new trial was denied. We affirm the judgment and the order denying a new trial.

APPELLANT'S CONTENTIONS

(1) His trial counsel was ineffective and gave inadequate representation in that he failed to investigate Stern's psychiatric history;

(2) Government counsel was guilty of misconduct in failing to advise the court of Stern's psychological problems and in failing to request the court to order a psychiatric examination to determine appellant's competence to stand trial; and

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*Of the District of Idaho.

(3) The court's post trial appointment of a psychiatrist and the doctor's examination of Stern were irrelevant to the claim of incompetent counsel, and the court improperly received in evidence the report of examination.

EVIDENCE TO SUPPORT CONVICTION

Stern personally waived his right to a jury trial. The court heard evidence that Stern, a former IRS agent, started a business in 1970 to bootleg tape recordings of musical hits. Orders were solicited by telephone, the business was run on a cash basis and a bank account was kept under a fictitious name. The 20 to 50 employees were paid in cash, did not complete tax withholding forms, were given no year-end statements of taxes withheld and were told that the taxes were "taken care of." A government expert computed Stern's taxable income for 1970 at $381,026.50, on which he owed a tax of $216,190.50. In his own defense, appellant attempted to put the blame on others and denied any intent to conceal matters from the IRS.

MOTION FOR NEW TRIAL

He was found guilty on June 27, 1974 and moved for a new trial on July 10, supported by affidavits to show that he was incapable of forming the specific intent to commit the offenses or of adequately cooperating in his own defense. He was then represented by a second retained counsel. Stern's affidavit recited a history of treatment for psychological problems and it was supplemented by reports and letters from medical personnel who had treated him up to the time of trial. He said that his trial attorney, Bruce Hochman, knew that Stern had undergone psychotherapy since 1971 and had lived at Esalen Institute where he had therapy.

The government responded on July 16 with a request for a court-ordered psychiatric examination.

In August 1974, appellant had a third attorney and more affidavits were filed. A psychiatrist who first saw Stern after conviction and before sentencing characterized appellant as a schizophrenic unable to control his thoughts or make appropriate choices, and "lack(ing) substantial capacity to conform his conduct to the requirements of the law at the time of the alleged criminal conduct for which he was convicted."

A psychotherapist who had treated Stern for more than two years agreed with that assessment and concluded that during that time Stern's "mental state was such that his mind was incapable of forming or possessing any specific intent to commit any (of the crimes charged)."

Another affidavit by Stern detailed his medical history and the fact that government counsel and Mr. Hochman were familiar with it. It alleged that Mr. Hochman and his assistants had commented on Stern's "eccentric behavior and lifestyle."[1] There was also reference to a meeting at which Stern's former attorney, Sturman, had told Mr. Hochman and government counsel of his reservations about Stern's mental stability.

Stern's affidavit charges Mr. Hochman with negligence and incompetence in failing to explore or investigate the existence of a potential "psychiatric defense" and points to the actual knowledge of the United States

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[1]In a letter to Stern after the motion, Hochman admitted the knowledge attributed to him in Stern's first affidavit, and recalled that these facts concerning Stern's psychological problems had been mentioned to government counsel. He said, however, that he had considered Stern competent to assist in the preparation of his defense.

Attorney of the defendant's mental condition, which was not divulged to the trial judge.

When the motion for new trial was first heard, the district judge said of Mr. Hochman that he "is perhaps one of the best tax lawyers handling criminal cases in Los Angeles County," and therefore not likely to have overlooked a meritorious available defense. The court did grant the government's request, naming Dr. Pollack to examine Stern, and postponing a full evidentiary hearing pending receipt of the doctor's report.

At an adjourned hearing in October, the court accepted Stern's affidavits and supporting documents and, over objection, Dr. Pollack's report. The doctor has not appeared in court but the judge had put the hearing over for a week to allow the defense to arrange for Dr. Pollack's appearance. The court declined to order the government to produce him for cross-examination.

The Pollack report concluded that, although Stern had been suffering from schizophrenia and psychotic lapses for some years, he did not lack mental capacity at the time of the offense and was able to consult and cooperate with defense counsel before and during trial. Mr. Hochman also testified as a government witness.[2]

He confirmed that he had received information on Stern's psychiatric background from the defendant and Mr. Sturman. He testified that he had discussed

[2]It is apparent that the district judge's characterization of Mr. Hochman, quoted in the body of this opinion, was apt. The substance of those remarks was confirmed by counsel at oral argument. A well-known law directory indicates that Mr. Hochman is a "Certified Specialist, Criminal and Taxation Law, 1973, California Board of Legal Specialization," a former Assistant United States Attorney, and author of many published articles on aspects of criminal tax matters. I Martindale-Hubbell Law Directory, 1004B, 1005B (1975 ed.).

the possibility of a "diminished capacity" defense with Stern. He elected not to utilize such a defense because he "believed it would have been counterproductive." Instead, counsel determined to defend on the basis of Stern's alleged reliance on the professional advice of his former tax lawyer and accountant. That such a defense appeared to have merit, said Mr. Hochman, was demonstrated by the serious consideration given by the prosecutors in the case to recommending a misdemeanor disposition in return for a guilty plea.

A tax division prosecutor testified that he knew of Stern's psychiatric history prior to trial but that virtually all of his information came from defense counsel. When Mr. Hochman did not raise insanity as a defense, the government did not feel it necessary to request an examination of the defendant. Instead the prosecution and defense focused on the defense of reliance on professional advice in pretrial negotiations and considered Stern's mental problems only as a possible basis for mitigation of sentence.

In denying the motion for new trial, the court found there was no evidence that defendant was insane either at the time of the offense or at trial, or that he was unable to cooperate effectively in his own defense. It also found that defense counsel was aware of any mental condition, gave it reasonable consideration and rejected it for tactical reasons. No misconduct by government counsel was found, either.[3]

[3]The district court's ruling concluded:

> "I am convinced that if there was evidence of a mental condition on the part of this defendant, that Mr. Hochman was aware of it and took those steps that an adequate and a competent defense lawyer would take in considering that as a defense, and if it was at all substantial, he not

(This footnote is continued on next page)

ADEQUACY OF REPRESENTATION

This court will not reverse a judgment of conviction unless a defendant's representation has been so inadequate as to make his trial a farce, sham, or mockery of justice. See, e. g., *United States v. Martin*, 489 F.2d 674 (9th Cir. 1973); *United States v. Ortiz*, 488 F.2d 175 (9th Cir. 1973). We have declined to find such a "farce and mockery," where counsel's actions or omissions reflected tactical decisions, even if better tactics appear in retrospect to have been available. *United States v. Ortiz, supra,* at 177; *Mengarelli v. United States Marshal,* 476 F.2d 617, 619 (9th Cir. 1973); *Johnson v. Craven,* 432 F.2d 418, 419 (9th Cir. 1970).

Mr. Hochman had not raised an insanity defense because it "would have been counter-productive." The court agreed, noting that failure to pursue this issue "could indeed be said to be a matter of tactics on the part of skilled counsel."

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only was aware of it, but must have given it his consideration in his overall plans for arranging the defense of this defendant. It could indeed be said to be a matter of tactics on the part of a skilled counsel, and I don't think that the defendant should be allowed to come into court after he has been found guilty and have a second trial simply because he wants now to take another tactical step.

"There is no evidence that the defendant was legally insane at the time of the commission of the offense or at the time of the trial, or that he was incompetent to cooperate with his counsel at the trial.

"I have called upon my own recollection of the manner in which this case was tried, and I am convinced that the defendant was well aware of the nature of the proceedings, was competent to cooperate with his counsel, and did indeed cooperate with his counsel, and that he was given a fair trial. I see no misconduct on the part of the Government or of defense counsel."

This conclusion is supported by the record. Appellant's primary defense was his alleged good faith reliance on the advice of his tax attorney and accountant before engaging in the activity forming the basis for his subsequent indictment. Compare *Williamson v. United States,* 207 U.S. 425, 453 (1908).

While a defendant may plead inconsistent defenses, here it appears that competent counsel might well have concluded that it would not have been in Stern's best interest to do so. Reliance on the professional advice defense, which counsel had reasonable grounds to believe might prevail, would have lost much of its force if combined with an insanity defense. Even those courts which have held counsel to a stricter standard than that provided by the "farce and mockery" test have generally refused to fault retrospectively such tactical decisions and give a convicted defendant a second bite at the apple. See, e. g., *United States v. Edwards,* 488 F.2d 1154, 1164-65 (5th Cir. 1974).

Appellant cites *In re Saunders,* 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970), for the proposition that a conviction may be reversed despite compelling tactical reasons, where counsel has not made adequate inquiries into his client's prior mental condition. *Saunders* was apparently premised on the theory that no intelligent tactical decision can be made as to which defense should be raised until the strength of the insanity defense has been adequately investigated. *Saunders* is inapposite here. The district court here concluded that Mr. Hochman gave the substantiality of an insanity defense adequate "consideration in his overall plans for arranging the defense of this defendant."

We cannot say this finding was in error. There was substantial evidence from which the court could find that counsel reasonably concluded that further inquiry into a possible psychiatric defense would have been wasteful of his and the court's time and his client's money.[4] Appellant and his counsel conferred 15 to 20 times before trial and discussed the possibility of an insanity defense at least twice. After extensive negotiations over a possible disposition by guilty plea, counsel was undoubtedly aware of the nature of the government's case[5] and in a good condition to evaluate its strength relative to both the reliance on professional advice defense and one based on insanity. This case is unlike *Brubaker v. Dickson,* 310 F.2d 30, 38 (9th Cir. 1962), where we found "[t]he defense actually tendered so insubstantial in relation to those not offered as to cast doubt upon the hypothesis that trial counsel made a deliberate, informed choice."

Nor can we say that the court erred in finding no inadequacy of representation in counsel's failure to ask the court to determine Stern's capacity to stand trial and waive his right to trial by jury. Counsel considered Stern competent to assist in his own defense.[6] The trial judge, who had an opportunity to observe Stern throughout the trial concurred in this view, and found that appellant did in fact cooperate with his counsel.

[4]See M. Fleming, *The Price of Perfect Justice* 76; *Brubaker v. Dickson,* 310 F.2d 30, 37 (9th Cir. 1962) ("Due process does not require 'errorless counsel,' and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." [Quoting *McKenna v. Ellis,* 280 F.2d 592, 599.]

[5]Evidence at trial supports the court's determination that Mr. Hochman's decision not to utilize such a defense was a reasonable and competent one. Testimony that appellant used fictitious names, used fictitious addresses, and reassured another not to worry about tax liability may well have convinced counsel that an insanity defense stood little chance of success.

[6]See note 1 *supra.*

The court lauded Hochman as an experienced and highly capable attorney in criminal tax matters. Hence as regards Hochman's failure to request a court-ordered mental examination, the case before us is on all fours with *United States v. Battaglia,* 469 F.2d 686 (9th Cir. 1972), where we held:

> "The claim of ineffective assistance of counsel is frivolous. The record indicates that the two attorneys were able and experienced and were highly commended by the trial judge at the close of trial. The trial judge was aware of Battaglia's physical condition, and was constantly observing him. If the issue of Battalgia's incompetency had any merit, it would have been raised by counsel, or the court would have stopped the progress of the trial.

469 F.2d at 686.

CONDUCT OF GOVERNMENT COUNSEL

Did government counsel fail in their duty to seek a psychiatric examination as soon as they had reason to doubt Stern's competence to understand the proceedings against him and cooperate in his own defense? It is contended that the court's retrospective determination that Stern was competent cannot obviate the government's misconduct in not seeking a resolution of this question before his waiver of jury trial and the trial itself.

The statute [18 U.S.C. §4244] requires the United States Attorney to apply for such a judicial determination. "[w]henever after arrest and prior to the imposi-

tion of sentence . . . [he has] reasonable cause to believe" a person charged with the offense may not be competent to stand trial. In this case the government did not have access to the record of appellant's mental history and current condition until the motion for new trial. Until then, the government's information except one letter[7] was based on facts supplied by defense counsel. We cannot say that the government acted unreasonably or breached any statutory obligation by relying on Stern's well-respected retained counsel.

When Stern's motion and supporting affidavit was filed, the government moved for a court inquiry into mental competence as §4244 would seem to require. *Cf. United States v. Irvin,* 450 F.2d 968 (9th Cir. 1971); *Morris v. United States,* 414 F.2d 258 (9th Cir. 1969); *Meador v. United States,* 332 F.2d 935 (9th Cir. 1964). It cannot be charged with misconduct for unreasonably delaying that determination.

Moreover, the court subsequently determined that Stern was competent to cooperate with his counsel at trial. While affidavits from a psychiatrist and a psychologist reached the opposite conclusion, resolution of this issue was for the court. The court's finding was based on substantial evidence, including the report of the court-appointed psychiatrist and the judge's own observations throughout the trial.

ADMISSION OF DR. POLLACK'S REPORT

The final contention is that the report of Dr. Pollack's court-ordered psychiatrist examination was hearsay and should not have been admitted without an op-

[7]The letter was from a psychotherapist who had treated Stern in weekly group therapy sessions in 1971 and found him "extremely confused and anxiety ridden" at that time.

portunity to cross-examine Dr. Pollack at the government's expense. Appellant admits that he did not utilize the time allowed by the court to arrange for the psychiatrist to appear for questioning but argues that it was the government's duty to produce Dr. Pollack for cross-examination.

This misconceives the nature of a court-ordered determination of competency to stand trial under 18 U.S.C. §4244. Under that statute, the district judge may appoint a "qualified psychiatrist, who shall report to the court." The psychiatrist is expected to be neutral and detached, and to advise *both* parties of his findings. See *United States v. Edwards,* 488 F.2d at 1160-65. When there remains a doubt of a defendant's mental condition the report "may be submitted as evidence" at a hearing on the defendant's competency to stand trial.

The §4244 report is primarily for the court's benefit, unlike psychiatric examinations conducted at the behest of a party. Though the government asked for it, the resulting report became the court's evidence.[8] Since Stern was not indigent, it was incumbent upon him, not the government, to bear the cost of challenging the report's conclusions, if he wanted to do so.

The judgment of conviction, and order denying appellant's new trial motion is affirmed.

[8]See generally IX J. Wigmore, *Evidence* §2484 (3d ed. 1940).

APPENDIX B.

Order.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Martin Stern, Defendant-Appellant. No. 74-3176.

Filed: Aug. 29, 1975.

Before: ELY and WRIGHT, Circuit Judges, and McNICHOLS, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Ely and Wright have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: